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## THE CRIMINAL IN THE AIR.<sup>1</sup>

DENYS P. MYERS.<sup>2</sup>

If, as has been stated, the criminal life appeals to its followers largely because of the absence of the prosaic in it, the evil-doer ought to come into his own when he takes to the air. To the bulk of the criminal class extensive use of the sea either for the perpetration of illegal acts or as a means of escape is precluded. Gambling aboard ship must obey the economic law of the demands for chance games at sea, and very few evil-doers have been financially successful enough to elude their pursuers by taking a water trip in their own craft. A relatively small number, also, find it worth while to escape by going abroad as passengers, thanks to extradition, which now forms a fairly complete net for the criminal's apprehension.

These objections are reduced, from the criminal's point of view, in the case of air craft. From the vantage of the air firearms and bombs can be used with some purpose on earthly targets, which fact places violent crime at an additional advantage, considering that the aim is good. But especially an aeroplane, or even balloon is within financial possibility of a good many of the criminally inclined. Many a criminal might have \$5,000 to buy an aeroplane, and by its aid could either avoid or excessively complicate his extradition.

Neat little mystery stories will shortly be—in fact are being—written around such circumstances, and as usual the possibilities are greater the more boundaries you introduce. For instance, a perfectly good American—speaking nationally—has a pet enemy, who is an Italian, and both are in France. The American suavely invites the Italian aboard his airship and takes him up into the air beyond all limits claimed by anybody to be under the control of the subjacent territory, if the European air-freedom theory persists. In this stratum of air the American pilots the craft above Swiss territory, knocks off the Italian, who lands in Bern and in the yard of the residence of the

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<sup>1</sup>General references are: Sperl, Hans—*Die Luftschiffahrt*, etc., V., p. 8; Bonnefoy, Gaston, *Le Code de l'Air*, sections 139-157; Fauchille, Paul, *Le Domaine aérien*, 53, 68; Sarfatti, Gustavo. *Delitti e quasi-delitti Responsabilità e garanzie in materia di aviazione*. Congresso giuridico internazionale, etc., 179; Giurati, Giovanni—*La locomozione aerea e il pericolo criminale*. Congresso giuridico internazionale, 221; Meili, Friedrich—*Das Luftschiff und Rechtswissenschaft*, 42;—*Das Luftschiff im internen Recht und Völkerrecht*, 36-44; Meurer, Christian,—*Luftschiffahrtsrecht*, 27-36; Grünwald, Dr. Friedrich.—*Das Luftschiff in völkerrechtlicher und strafrechtlicher Beziehung*, 41-60.

<sup>2</sup>Boston. Member of Comité juridique international de l'Aviation.

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Russian minister, a portion of Swiss soil which is acknowledged to be Russian by reason of its diplomatic use. The American continues his aerial voyage, landing in Germany.

That is the first class criminal complication. Look at it a moment. No known jurisdictional dicta apply. There is even a question of whether crime was committed, although the dead Italian shows that something out of the ordinary happened. He was undoubtedly dead before striking the ground, but the push given him by his comrade certainly did not kill him. Moreover, the push was administered when the vehicle was conceivably beyond the jurisdiction of any state. France really has no interest in punishing the American, for he simply began a perfectly regular aerial trip from her soil; and Germany has no more concern, for he only landed on her territory. He did not enter Swiss jurisdictional boundaries, although the Italian probably expired while passing through her atmosphere. Enter Russia with an interest in preventing the dropping of corpses upon her ex-territorial possessions. Italy desires to protect her citizens from criminally inclined Americans, but would encounter the difficulty that neither France, Switzerland, Russia nor Germany harbored the perpetrator when the crime was committed and would have to split hairs some way to establish her right to securing the American for trial. Inasmuch as the latter was out of his country during the whole series of circumstances, the United States could scarcely be appealed to under rigid rules.

Such a series is infinitely more complicated—and even it does not exhaust the aerial possibilities—than anything that could occur at sea. Doubtless the legal decision would be somewhat along the lines of *Commonwealth v. Macloon* (101 Mass. 1), where a foreigner to the United States on a foreign vessel belonging to a state different from that of which the defendant foreigner was a citizen, injured a man, who died in Massachusetts. The court held that jurisdiction lay where the crime took effect, and Massachusetts proceeded to punish. In the case above, then, Switzerland (or Russia) would prosecute as a plaintiff in error, if, as supposed, the Italian died in mid-air within its jurisdiction.

Before such a clear-cut decision could be rendered, however, legal lights would have to determine how much of a drop through air a man must undergo without being legally dead and even if jurisdiction should lie for the consummation of a deed during such a transitory and casual passage.

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These are fundamentals, and although it does not touch the former, Paul Fauchille's original project of code<sup>1</sup> does deal well with crime in the air in his Art. 15, which says:

"Crimes and misdemeanors committed aboard aerostats (or aeroplanes) wherever they may be in space, by members of the crew or other persons aboard, are within the competence of the tribunals of the nation to which the aerostat (or aeroplane) belongs and are judged according to the laws of that nation, whatever be the nationality of the authors or victim."

"This would secure unity of procedure at the expense of justice," comments Judge Simeon E. Baldwin.<sup>2</sup> Arthur K. Kuhn<sup>2</sup> adds that the principle adduced is likewise against the basis of Anglo-American law, which is territoriality. While these glosses are correct, it would seem that probably an international agreement will compromise in the direction of Frauchille's statement of the case.

### FOREIGN GENERAL CONCLUSIONS.

Mr. Kuhn's objection is met in part at least by Meurer's statement of the theory of territoriality. He says that "air craft, public or private, so long as they travel above the high sea, will be considered as a movable part of the territory of the flag state by virtue of their nationality.

"According to my opinion warships in the waters of a foreign jurisdiction have no territorial position. While on the high sea they can be considered as part of their home state. In foreign territorial and coastal waters they have only an ex-territorial character and are in truth in the foreign state's jurisdiction, but are freed from the jurisdiction of the place.

"The ship itself has penal power over the penal acts of the crew occurring on board the warship, which it is entitled to exercise abroad (M. St. G. B., § 7).<sup>1</sup>

One of the earliest brochures on legal relations in the air was a work by Dr. F. Grünwald, military counsel of the first German guard division. He concludes:

"Only so far as the interest of the territorial state extends is it justified in the exercise of jurisdiction over crimes committed in its property-sphere."

With characteristic German thoroughness he scientifically views

<sup>1</sup>*Annuaire de l'Institut de Droit International*, 1902.

<sup>2</sup>*American Journal of International Law*, 95 and 109.

<sup>1</sup>*Op. cit.*, 28.

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the subject from its various standpoints, analyzing the character of possible aerial crimes. He finds:

*Penal acts of airmen over the high sea or unoccupied territory.*

1. If a penal act is committed in this territory in or from a state air craft, the home state of the air craft is the state where the act is committed.

2. If a penal act is committed in these regions in a private air craft, the act cannot be punished otherwise than by the law of the home state of the air craft. It is the same with lawless territory. (Cf. section 4,<sup>1,2,3</sup> R. St. G. B.)

*Penal acts of airmen over states, their territorial and coastal waters.*

Penal acts committed in or from a state air craft above foreign states, their territorial or coastal waters are considered as perpetrated in the home state of the air craft. The circumstance that the deed committed from the air craft may take effect in another state establishes no legal status in the affected state by reason of exterritoriality.

*It is not so simple if the penal act occurs in or from a private air craft.* The following cases may be distinguished:

1. The deed is directed from the air craft against the life and property of a person on the soil of the ground-state. Jurisdiction lies where the penal act takes effect. (Cf. section 3, *Reichsstrafrecht Gesetzbuch.*)

2. The act is limited in its effects to the air craft of the perpetrator. In this case one must learn the position in the property-sphere of the ground-state so far as it lies above the soil or territorial sphere of the ground-state. The authorities of the ground-state are therefore, from a purely theoretical point of view, competent to punish, in preference to all others; against which the authorities of the state of the air craft or its inhabitants would interpose under the same suppositions under which they are accustomed to interfere in regard to their state-relation as respects delictions perpetrated abroad.

Above the coastal waters or sphere of interest of a state, because of lack of interest, it is likely that no law would be interposed.

3. The deed is directed from one air craft against another air craft or persons aboard.

Where the place of origin of the deed is in the property-sphere of the ground-state, the state's authorities must interpose in the first instance.

The deed being directed against the public air craft, the authorities of this state would have to be concerned if the ground-state did not institute prosecution. In the case of a private air craft of a third state, the place of origin would decide.<sup>1</sup>

The place of origin being above the coastal waters or the sphere of interest of the ground-state, the supposition is that the law of the ground-state would interpose an interest based on international law.<sup>2</sup>

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<sup>1</sup>Page 50.

<sup>2</sup>Page 52.

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There is, of course, much too little known of the necessary conditions for any summary dicta to be more than suggestive and it therefore seems worth while to indicate what conclusions other writers have reached. Friedrich Meili goes into detail with typical German thoroughness as follows:

1. Crimes on air craft against legal property (*Rechtsgüter*) which is thereon.
2. Crimes from air craft in respect to legal property which is located elsewhere: a. On another air craft; b, on the earth; c, on ships on the high sea, on coastal waters and in harbors.
3. Crimes against air craft: a. From the point of vantage of another air craft; b, from the earth; c, from the sea, coastal waters or harbors.<sup>3</sup>

And taking these up *seriatim*, he sets down conclusious:

1. Here, doubtless, the application of the law of the flag is correct.
- 2a. The law of the flag is here correct, and that of any state to which the delinquent craft belongs—there arises a doubt—shall it not depend on the law of the state in which the effect (intermediary or final?) occurs?<sup>1</sup>
- 2b. Here a correct solution is based on the designated national law as shown by the flag. But the state whose legal property is violated can adopt the principle of the effect. A choice must be made.
- 2c. Two national laws: a. The national law of the state to which, by virtue of its flag, the air craft belongs; b, the national law of the state to which the ship belongs.

Crimes on ships in coastal waters involve properly the law of the flag, if the ship is in transit (two national laws in conflict).

If on merchant ships in a foreign harbor: a. The law of the territorial state; b, the law of the flag of the ship. The fiction of the state where the effect takes place should here be noticed.<sup>2</sup>

3. Does the air craft come in the same category as other means of transport? Art. 155, Swiss *Strafgesetzbuch*, June, 1903:<sup>3</sup>

Whoever wilfully imperils the safety of foreign traffic, especially on streets, ways or public places (*plätze*) or the safety of navigation or aerial navigation, so that human life is put into danger, shall be punished by imprisonment?

If it does we can distinguish:

1. Attack on safety of the air route and air traffic.
2. Ordinary delictions.
3. By shutting off the aerial route.
4. By preparing obstacles to departure from harbor or station and to descent.
5. By false signals on these occasions.

I am of the opinion that the customary fiction (of the effect) should

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<sup>1</sup>*Op. cit.*, 38.

<sup>2</sup>*Ibid.*, 39.

<sup>3</sup>*Ibid.*, 40.

be extended and that therefore attacks against air craft are to be decided rather according to the law of the place than of the perpetrator.

Furthermore, one must consider whether the whole apparatus and establishment of the air craft undertaking shall not be placed under the protection of a special penal code, as is the case with ships (German Penal Code, sections 90, 21, 243, 7, 265, 305, 306, 2, 320).<sup>4</sup>

There is no dissenting voice to the proposition that infractions of law affecting the safety or fortune of a state, such as conspiracy, treason, counterfeiting, etc., shall be judged by the tribunals and under the laws of the injured state, if such deeds are committed in any part of the air-space. In fact, the general principle of the right to preserve its own interests and institutions from injury or threatened injury from the air will probably be the chief guide post in setting up a code of law for aerial machines; which consideration is certainly a potent argument in favor of full jurisdiction, despite the desire of Europeans to make the air-freedom theory prevail.

These things refer to private air craft only. Public air craft will, of course, be as free as public sea-going vessels, and local authorities in such cases ought to interfere only upon the written request of the official in charge of the machine.

So much for general considerations. Writers interested in the subject of aerial law have examined a large number of the questions likely to arise, and it may not be amiss to set down the considerations which have occurred to writers and law makers.

#### DIVISIONS OF AERIAL CRIMINAL LAW.

The *Comité international*<sup>1</sup> has not yet taken up the study of criminal law in relation to air craft, but provides for the subject in its fourth book. The arrangement of topics was decided as follows:

Title I. Crimes and Misdemeanors Against the Safety of States.

Title II. Crimes and Misdemeanors Against Individuals.

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<sup>4</sup>*Ibid.*, 41.

<sup>1</sup>The *Comité international juridique de l'aviation* was organized late in 1909 and publishes a review. It is engaged in elaborating an aerial code, the articles of which are adopted at annual congresses. In addition an International Juridic Congress for the Regulation of Aerial Locomotion was held at Verona, Italy, May 31-June 2, 1910, for the discussion of legal problems. The honorary presidents of this unofficial gathering were Cesare Fani, Italian minister, keeper of the seals; Paul Fauchille, member of the Institute of International Law; Edouard d'Hooghe, president of the International Juridic Committee on Aviation; Paul Lapland, professor in the University of Strasburg; Chevalier Pietro Benini, attorney, municipal assessor delegated to the congress. The president was Senator Commendatore Vittorio Sciolaoja, professor in the University of Rome. The congress divided its work, with reporters on each subject studied—about 20.

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- Chapter 1.
  - a. Abuse of Authority.
  - b. Hindrances to the Free Exercise of Aerial Locomotion.
  - c. Attempts Against the Safety of Aeronauts or Pilots and their Machines.
- Chapter 2. Damage to Monuments.
- Chapter 3.
  - a. Gross Negligence.
  - b. Involuntary Assaults and Homicides.
  - c. Disregard of Regulations.
- Chapter 4. Force Majeure in Penal Matters.

In considering the questions which have been discussed, this order will be adhered to, though from the point of view of Anglo-Saxon jurisprudence alone it should doubtless be altered. But there are so many reasons for believing that international diplomatic action in conference assembled will determine the lines of legal advance in regard to aeronautics that the plan of this most important co-ordinating force in the field seems the proper basis for discussion of what has been already done toward the end of controlling aerial crime by law.

### THE SAFETY OF THE STATE.

The safety of the state is a paramount requirement of the law makers, and there need be no concern but that it will be amply provided for in the statutes and, they being lacking, that the courts themselves will apply the ample precedents they have for the protection of the social organism. Hazeltine,<sup>1</sup> discussing jurisdiction over crime, reaches the patently proper conclusion that with full sovereignty of the subjacent state in its air-space all crimes committed there will be brought within the jurisdiction of its courts. Considering the matter from a general standpoint it is interesting to note that the Fauchille project<sup>2</sup> of 1902 contained a somewhat elaborate discussion of crime in the air, while the latest revision of it in 1911 dismisses the matter with a general statement of the competence of the courts. The earlier project says:

Art. 15. Crimes and misdemeanors committed aboard aerostats<sup>1</sup> (or aeroplanes) wherever they may be in space, by members of the crew or other persons aboard, are within the competence of the tribunals of the nation to which the aerostat (or aeroplane) belongs and are judged according to the laws of that nation, whatever be the nationality of the authors or victims.

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<sup>1</sup>*The Law of the Air*, 92-93.

<sup>2</sup>*Annuaire de l'Institut International*.

<sup>1</sup>Used in a general sense as equivalent to air craft. The parenthesis is added by the translator.

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At all times infractions which threaten the safety or fortune of a state, such as conspiracy, treason, counterfeiting, etc., shall, in whatever place they are committed, be judged by the tribunals, and according to the laws of the injured state.

Likewise the border state is judicially competent in the case of aerostats (or aeroplanes) which, in defiance of its rights of preservation, have trespassed upon its zone of isolation, devoted themselves to espionage or fled from its sanitary or customs inspection.

The authorities of a state upon whose soil an aerostat (or aeroplane), upon which a misdemeanor has been committed, shall land, may, when the deed exceeds the competence of the local jurisdiction, proceed with the arrest of the author of the infraction and take the necessary measures, subject to instructions; they shall, as soon as possible, turn over the delinquent to the competent state for judgment. When the misdemeanor has taken place aboard a public aerostat (or aeroplane), the local authorities shall intervene only upon the written demand of the commandant of the aerostat (or aeroplane).

Art. 16. From the application of Art. 15, paragraph 1, are reserved the principles applicable to capitulatory countries.

The equivalent provisions of Fauchille's later editions were formulated in his 1910 project and adopted by the Institute of International Law at Madrid in 1911, without revision, as follows:

Art. 13. Acts committed on board of public and private aerostats fall under the competence of the tribunals of the state to which the aerostats belong, and are judged according to the laws of that state.

However, acts which menace the right of preservation of the subjacent state or which cause damage to its territory as well as to the property or persons of its inhabitants, should be judged by the tribunals and according to the laws of the territorial state.

Grünwald, concluding his book on *Das Luftschiff in Völkerrechtlicher und strafrechtlicher Beziehungen*,<sup>2</sup> offers some hostages in this regard to the idea of a free zone which was prevalent at the time he wrote (1908). He says:

1. The aerial domain over a state is its property-sphere. The air space over the coastal waters of a state is its sphere of interest. The air space over the high sea or state-free land is free territory.

2. The property right of a ground-state in the space above it should be exercised no further than the interest of the ground-state demands. To international trade the limits should be placed only as the interest of the ground-state pressingly demands.

3. Only so far as the interest of the ground-state extends is it justified in the exercise of jurisdiction over crimes committed in its property-sphere.

Though none of these opinions contemplated the principle of full sovereignty over the air-space, for which the present writer argues in

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<sup>2</sup>Page 61.

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every branch of the subject, be it international or national, they certainly admit of that ample jurisdiction which is the natural result of sovereignty. It will therefore not be amiss to consider what decisions have been reached in respect to specific offenses against the safety of the state, a term for the moment employed in its broadest meaning so as to include both sovereign and federal states as well as lesser governmental units. First regarding international law.

### INTERNATIONAL LAW.

*The Flag and Espionage.*—The use of the national ensign in some form in aerial navigation would possibly result in abuse or misuse of it. This was contemplated by the German Juridic Committee in one of its early projects and the result of its consideration<sup>1</sup> was that “each state engages to punish all abuse of the national flag as well as every contravention of the prescriptions cited which are committed by its air craft, which transgressions have been committed in the country itself, abroad or in inhabited territory. Punishment abroad excludes a second punishment in one’s own country.” The suggestion, made in connection with a study of jurisdiction, was rejected under that head, though as an international provision it might be well worth while.

In America we are happily free from the suspicions of European countries, which render espionage so important a concern to them, even in times of peace. It is therefore with little sympathy that we can look on the text of the first Fauchille project, which was directed in all its parts at protection from spies, its now rejected scheme of a territorial zone being especially designed to that end. Europe, it would seem, has not shared his view, or, at least, has not expressed itself, for his elaborate article dealing with espionage in time of peace has now entirely disappeared. Aerial espionage in time of peace is therefore probably on the same legal basis as any other attempt to pilfer military secrets. Fauchille at first would have had this adopted:

Art. 9. Every public or private aerostat (or aeroplane), outside of those mentioned in Art. 10, which penetrates the isolated zone of a state without observing the prescriptions of Art. 11, 2, may be suspected of espionage.

Balloons (or aeroplanes) of the border state, charged with police duties in the air, may pursue, capture and conduct it to earth.

In like manner, the authorities of the territory which shall see it will have the right to require it to come to earth, and to fire upon it to make it obey this injunction.

After the landing, if the suspicions of espionage are confirmed, it

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<sup>1</sup>Revue juridique, 171.

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(the police authority) may proceed to apply the local laws and regulations concerning the repression of espionage.

If, contemning the order given it by the territorial authority, the balloon (or aeroplane) tries to take flight, the state has the right to pursue, arrest, board and capture it. This pursuit ceases when the aerostat (or aeroplane) enters the zone of isolation of its own state, or that of another state.

It cannot be denied that all of this—excluding the application of the zone theory—might be desirable in Europe, but espionage is not something they proclaim from the house tops in the deed or the repression thereof. Some latitude is desirable. And when the Diplomatic Conference met in 1910 the subject was covered in a general way in the bases of discussion by the enunciation of the principle that “military and police aerostats may cross the frontier only with the authorization of the country above which they desire to pass or in which they propose to land. Other public aerostats are submitted to the same rules as private aerostats. No aerostat shall enjoy exterritoriality.”

Several instances have occurred, the most noteworthy being the case of the German dirigible which inadvertently landed at Lunéville, France, in the spring of 1913. As a result Germany issued these regulations:

Article 1. The aeronautic officers are requested to keep their balloons at just such a height that they may communicate by megaphone with gendarmes or the gardes-champêtres and thus learn their whereabouts.

Article 2. The officers are requested to read attentively the sign posts at road crossings, and when near the frontier they shall keep in communication with the custom houses.

Article 3. For a greater degree of surety the Zeppelins will henceforth be provided with wheels, and when the pilots are unable to find guides in German uniforms they shall follow the prescribed roads.

Article 4. All the German villages near the frontier will henceforth have the roofs of their houses painted yellow and will fly large pennants bearing the inscription, “Exit Forbidden.”

Article 5. For greater surety all German aeronautical craft will henceforth do their reconnoitering at least 200 kilometers from the frontier.

Article 6. The aeronautic officers will be always in civil clothes and provided with papers stating that they are Swiss engineers, Belgian merchants or Dutch water colorists.

The pending French bill prohibits the public air craft of foreign states from crossing the French frontiers. Private foreign aircraft are left under the control of rules to be formulated by the authorities.

As a result of the landing of a German dirigible at Nancy, in the spring of 1913, France and Germany took up the question of air traffic

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and a convention in the form of an exchange of letters came into force on the subject on August 15. By it private air craft are at liberty to cross the frontiers save in districts of military importance. Public air craft may cross only on authorization from the other state. Military air craft forced across the frontier by weather are to come down at once and report to the nearest military authority, which must protect the air craft (dirigibles are particularly contemplated), though they are entitled to examine it to determine whether the plea of necessity was justified. After the officer in charge has pledged his word that nothing has been done since crossing the frontier which could prejudice the safety of the country, such as making sketches, taking photographs or transmitting wireless telegrams, the distressed air craft is to be accorded exterritorial advantages; and it may not be detained. Should the plea of necessity not be justified, the case will be sent before the judicial authorities and the other government will be so informed. Air craft under military supervision must carry a distinguishing mark, legible at a distance. This convention was negotiated by M. Renault and Herr Kriege, juris-consults of the ministries of foreign affairs, and is to remain in force until superseded by general international agreement.<sup>1</sup>

The Russo-German frontier has been frequently violated by airmen. The last case, in the middle of August, was that of private German balloonists, who landed near Warsaw, and were arrested and detained by the Russian authorities. They met with a warm reception from sharpshooters, but none was wounded. After being detained a few days they were released and received permission to return to Germany.

In May, 1913, Brindejonc des Moulinais flew from Bremen to London. On May 15 he was summoned to Bow Street Police Court, London, on charges under the English Aerial Navigation Acts, 1911 and 1913, being the first foreign airman ever tried for aerial violation of public law. The charges<sup>1</sup> were that the defendant, as a person in charge of an aeroplane, failed before starting on a voyage to the United Kingdom to send notice to the Home Office stating the proposed landing place, the approximate time of arrival, his name and nationality; and with contravening the orders of the home secretary made under the Aerial Navigation Acts, 1911 and 1913, by navigating a certain air craft, coming from a place outside the United Kingdom, over part of the United Kingdom, namely, passing over the prohibited area of

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<sup>1</sup>Text in 4 Revue juridique, 240.

<sup>1</sup>London *Times*, May 16, 1913.

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Dover, the magazines at Purfleet and Woolwich Arsenal. Herbert Musket, who supported the summonses on behalf of the Home Office, made it clear that the case was not very serious and invited the magistrate not to proceed to the infliction of a penalty at all unless compelled to do so. The aviator said that within two months he had flown over many countries and was unable to learn the law of each of them. He promised to observe the law the next time he visited the country, and said he would ask the Aero Club de France to acquaint its members with the laws of various countries. The magistrate accepted this explanation and bound the defendant over in his own recognizances in 1,000 francs to come up for judgment, if called, within twelve months.

Julien Levasseur, another French airman, was arraigned in the same police court on July 4, on substantially the same charges. He had left Paris in a waterplane, entered the Thames by way of Margate and alighted at Blackwall. In his flight up the river he passed over several prohibited areas. The defendant pleaded guilty to the charge of passing over the areas and expressed the fullest apology, having previously called at the Home Office to apologize as soon as he had learned of his misdemeanor. The magistrate said that the laws should be made more widely known and did not think it necessary to impose any penalty. But as this was the second case the defendant was bound over on his own recognizances in 1,000 francs to come up for judgment if called upon, and had to pay costs of £5 5s.

*Customs Regulations.*—Smuggling is a romantic pursuit, which has been much referred to in connection with aeronautics, but which is as yet scarcely attempted and is still unconsidered in detail by the legal acumen already devoted to aerial law. That the act would be no less criminal when performed by the air than by the water route needs no proof. The difficulty lies in apprehending the criminal and there can be no doubt but that an aerial police will eventually be given full power in this respect, if necessary. The danger to the state does not seem actually very great, and according to a writer in the *Springfield Republican*, would be along three principal lines.

“Bulky articles, of course, would not be affected,” he asserts. “But the case is very different with laces and diamonds. All the diamonds imported into the United States in a year could easily be brought in by a single air craft. The operation of such a smuggling scheme, too, would be simplicity itself. There need be no large organization. A partnership of three would answer perfectly.

“The aeronaut would simply have to take the goods received from A to an arranged point across the line where B could find them. It

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may be possible to patrol a frontier line; it is obviously impossible to patrol the superficies of a country. There are plenty of wild and solitary places along the Canadian frontier where an aeronaut could alight with the utmost ease and depart at his leisure, quite unobserved. Nor need the place of deposit ever be twice the same. Diamonds and laces are no great matter, because there are so many possible ways of taxing the fortunate people who can afford such luxuries. Plainly there are the possibilities of a lucrative trade in smuggling excluded Asiatics and undesirable persons like criminals, anarchists, immoral women and victims of infectious diseases across the frontier. The Mexican border offers for this trade special facilities, because of its wide desert spaces where airships could be built and operated without observation, observing merely the precaution of flying by night. But such a trade, while it might bring large profits, could probably be kept under control by careful police work, for a live cargo leaves traces that can be followed; a passenger business cannot be carried on without an organization and some visible stir."

A couple of cases of customs difficulties have occurred. On Sept. 22, 1910, Edouard Nieuport won a cross-country race at the Mauberge meet, near the Belgian frontier. He landed at Grandreng, Belgium, and returned to France with flowers and cigars with which he had been presented by young Belgian women. The aviator distributed the cigars among the notables present at the meet, including a French customs officer. The latter evidently had his suspicions aroused, for he instituted a careful inquiry into the incident; for France already had regulations dealing with aerial importations. It was the same regulations that gave the Welsh aeronaut, Willows, trouble in November of the same year. Willows started to go from London to Paris in his dirigible, but from loss of gas was obliged to descend at Douai, where the French customs authorities held him up, demanding 700 francs duty on the gasoline he carried. Gendarmes guarded the balloon for a day or two until the situation came to the notice of higher officials, when the aeronaut was allowed to proceed.

Provisions applicable both to espionage and customs protection and relating to captive balloons are found in the Fauchille projects, of which the one prepared in 1902 said:

Article 30. In time of peace captive aerostats may be installed above the territory or territorial waters of a state at less than 1,500 meters (1,635 yards) from the frontiers of the neighboring states.

In time of war, captive neutral balloons may not be established upon their territory at less than 10,000 meters (10,900 yards) from belligerent states. But captive belligerent aerostats have the right of maneuvering

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upon their own territory even to the boundaries of neutral states. Captive belligerent aerostats may not be installed upon, nor even pass over the territory of a neutral state.

The later one covered the same ground more succinctly:

Article 6. 1. Captive balloons will not be entered in the official registers. They will not be placed less than 1,500 meters from the frontiers of adjacent states.

MUNICIPAL LAW.

*Police Control.*—Police regulations are at present few, being confined chiefly to Europe, where municipal authorities have generally barred flying over cities. As early as the week of May 22, 1910, the achievement of the young German-American aviator, Robert Frey, in flying across Berlin in a Farman biplane brought to light the fact that navigation over German towns in a flying machine, like so many other things in the Kaiser's realm, is "verboten." Hubert Latham committed a misdemeanor when he flew from the Tempelhof Field, Berlin, to Johannisthal in 1909, and had to pay a fine of \$37.50. Another aviator, the young Alsatian Jeannin, was mulcted to the tune of \$12.50 for a similar offense in April, 1910. The theory of the Berlin police was that aeroplaning is still too undeveloped a science to permit men to fly about at will above the heads of law-abiding citizens. Flights for the present, therefore, were considered a danger to public life and security and punished accordingly.

On Aug. 3, 1910, Brandenburg put into force a law regulating aeroplane flights. By it aviators are forbidden to fly over towns during the course of cross-country flights, of which three days' notice must be given. They must also obtain certificates of efficiency, which they are to deliver to the police before they take part in competitive flights, whether cross-country or within an enclosure. In the latter case competitors shall not be permitted to fly outside of the boundaries under penalty of 60 marks (\$15).

Strassburg, on Sept. 5, 1910, practically prohibited trips by passenger-carrying air craft over the city and vicinity on account of a fear of the military authorities that foreign passengers might photograph the forts. So they caused a refusal to grant landing facilities to be made.

M. Lépine, the Paris prefect of police, issued in October, 1911, a code of rules regulating flying about Paris. According to the New York *Sun* of October 23, the chief provisions are:

1. The new regulations will apply to the three following classes of machines for aerial locomotion: aeroplanes, dirigible balloons and free

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balloons; all three classes will be included under the general denomination of *aéronefs*.

2. Landing at any point within the city of Paris or the communes of the Seine Department is forbidden.

3. Apparatus circulating above Paris and the chief towns of the department must keep at such height that a landing can be made at a point free from collections of buildings.

4. Pilots of dirigible or free balloons may not throw overboard any form of ballast but fine sand.

5. No *aéronefs*, if compelled to land unexpectedly, may make a new start from the place of landing. All apparatus must be taken to pieces and removed to the nearest fixed starting grounds.

So far as is known, these regulations have been observed, but another Paris regulation promulgated a few months later was not so fortunate, and at the same time it was announced that M. Lépine was considering a scheme to supply the police with aeroplanes in order to prevent certain infringements of the law. On Jan. 20, 1912, Pierre Védrines, the noted aviator, violated the Paris regulation forbidding the throwing of handbills in the streets. He circled over the city in a monoplane and in passing the Chamber of Deputies sent down a shower of circulars imploring the deputies to pass the bill just introduced which provided a large sum for increasing the aeroplane outfit of the French army. The deed seems to have gone unpunished.

In 1911 there was passed in the United Kingdom virtually by consent of the two Houses an act (1 and 2 Geo. 5, Ch. 4) empowering the government to prohibit flying in a particular vicinity at any time. In 1911, June 22, 23 and 29, were the dates of the three coronation processions; June 30 of the King's Fête to London school children at the Crystal Palace; and on July 3 and 4, his majesty held reviews of the Officers' Training Corps and Boy Scouts at Windsor. In anticipation of these events the following notice, itself a sample of many others, was issued:

In pursuance of the power conferred on me by the Aerial Navigation Act, 1911, I hereby, for the purpose of protecting the public from danger, make the following order:

I prohibit the navigation of air craft of every description over the County of London on the 22nd, 23rd and 29th days of June.

I prohibit the navigation of air craft of every description over the County of London and over the Urban Districts of Penge and Beckenham on the 30th day of June.

I prohibit the navigation of air craft of every description over Windsor Great Park on the 3rd and 4th days of July.

W. S. CHURCHILL,

One of His Majesty's Principal Secretaries of State.

Home Office, 12th June, 1911.

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In 1913 again a more stringent Aerial Navigation Act was promulgated, the practical feature of which was the designation of certain areas of military importance, above which all flight was prohibited. It was under this act that the prosecutions related above<sup>1</sup> were made. As a matter of fact, the British authorities, in their zeal to protect alleged military secrets, seem to have overreached themselves in this case; at any rate, that was the opinion of the Royal Aero Club, which addressed a memorial of protest to the Home Office in July. The club asserted the prohibition had hampered the industry by preventing continuance of manufacture and experiment at certain places previously chosen; that British aviators were deterred from flying abroad on account of the restrictions they must face on the return journey; and that competitions were impracticable. The club suggested a register of aviators exempted from territorial prohibitions; that approved registered British aviators should be allowed to pass over prohibited areas when coming on a notified trip from abroad; that a further portion of the coast be scheduled as a landing area; that hydro-aeroplanes be permitted to alight in convenient specified places; and that sporting free balloons be freed from the application of the regulations. The Home Office, it is understood, modified the rules in the general sense desired.

The Aero Club of America in July, 1911, promulgated a resolution designed to prevent flying over cities. It is the only national regulation of the kind in America, and though not law, has the force of public opinion as well as the authority of the club behind it. It reads:

Resolved, That the Aero Club of America strongly deprecates the practice of flying over large cities at this stage of the development of aeronautics; that this practice presents in many cases danger to the public and offers no particular good or utility from a scientific or any other standpoint, and that any accident brought about thereby at this time would greatly discourage the progress of the art by arousing popular prejudice against it.

Further Resolved, That the Aero Club of America, while fully realizing the large margin of safety attending flights over cities when made by experienced aviators in standard machines at a height sufficient to glide to a safe landing should the motor fail, finds it difficult to make distinctions between flyers and machines and to enforce flying at an altitude of safety (which in itself varies with the breadth of the dangerous zone flown over), and that therefore it urges upon all its licensed pilots and those desiring to become such to refrain from over-city flying.

In the following November Harry N. Atwood desired to see the Harvard-Yale football game at Soldiers' Field, but was unable to get tickets. He therefore announced his intention of flying over the field

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<sup>1</sup>Page 829.

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while the game was in progress. The college authorities prevailed upon him that this was not a wise course and he gave up the project, apparently of his own accord after the passage of another resolution by the Aero Club of America's board of governors, which read:

Whereas, it has come to the notice of the board of governors of the Aero Club of America, that the practice of flying over spectators and contestants in athletic sports and games is becoming prevalent among aviators, and,

Whereas, Such flying unnecessarily endangers human life; be it therefore

Resolved, That all aviators licensed by the Aero Club of America be and are hereby forbidden to fly over or in the close vicinity of spectators or contestants in games or sports other than licensed aviation meets or exhibitors in which the flying is governed by the rules for the meet or exhibition, and, be it further

Resolved, That the contest committee be and is hereby instructed to take cognizance of any violation of the above inhibition and apply such one of the penalties set forth in Article 63 of the Regulations of the International Aeronautical Federation, as it may deem expedient.

In June, 1912, the Intercollegiate Rowing Association was planning to hold a regatta at Poughkeepsie on the 29th, and wrote to the Aero Club to "request that your club take such action as may be possible to prevent aeronauts and aviators from operating aeroplanes or other air vessels over the course."

In reply, Winthrop M. Southworth, assistant secretary of the club, under date of June 11, transmitted the above resolution to the association, and wrote in detail of the situation as follows:

We have your letter of June 10 in regard to aviators flying over boat races and particularly during the time of the regatta to be held at Poughkeepsie on June 29. We beg to say that by resolution passed on Nov. 13, 1911, a copy of which was sent to all our licensed aviators, the club through its contest committee forbade such flying under penalty of suspension or revoking of the license as the individual case might require. The club is doing everything in its power to prevent this and any case which may be brought to its attention will be promptly dealt with.

We, of course, have no control over unlicensed aviators, but we may say that we are keeping a careful record of such performances on the part of unlicensed men and should such flyers at any subsequent time apply for a license they might not unlikely have considerable difficulty in obtaining one.

In June, 1913, the polo match for the international cup was held at the Meadow Brook Club. Aviators supposed to come from the Moisant school at Hempstead Plains flew over the field and dropped notes. The Meadow Brook Club sought an injunction from the New York Supreme Court, but it seems that this application and the published opinion of several governors of the Aero Club of America were

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sufficient to deter other aviators from repeating the offense. The sporting control of the Aero Club is very real. All aviation sporting contests are under the auspices of the International Aeronautic Federation, with which national clubs are affiliated. A license to fly, issued by any club, entitles the holder to contest for prizes, gives him a professional standing and is otherwise of advantage. The aero club may suspend the license and while that does not prevent the holder from flying, it does bar him from contests and in a very actual way blacklists him.

The pending French law deals with several points that were also considered in the earlier decree of 1911. Traffic over certain districts, which are to be determined at a later date, is forbidden; so, too, is the transport without special permission of explosives, arms and ammunition, photographic apparatus, wireless telegraphy and wireless telephone apparatus, and carrier pigeons. A log has to be written up and kept for two years after the date of the last entry, since it is considered advisable in the interests of national security, to have available the record of all air journeys made over French territory. State air craft will display a special sign, which private air craft will be forbidden to use. The air craft of foreign states are prohibited from crossing the French frontiers, and the bill leaves to the authorities the drafting of the rules to be observed by private foreign craft on entering French air, on landing in and on leaving French territory. The government will thus have full freedom of action to negotiate an international agreement on these points.

CRIME AND THE INDIVIDUAL.

Crimes and misdemeanors against individuals, the subject of the Comité international's title II, may be considered from the vantage point of both the land and the air. If, as is certain, the air-freedom theory is defeated but, as is also certain, the right of innocent passage is accorded to airmen, it will be as much of a misdemeanor to interfere with innocent passage through the air as it would be to interfere with free circulation on the highway. No trespass would then result from innocent passage, and the land owner would be stopped from hindering the free exercise of aerial locomotion. The land owner should, it would seem, always have the advantage of responsibility without fault resting on the airman; for while the land owner ought not to be allowed to string wires to prevent an enforced landing, he surely ought to be easily able to secure compensation for damage done, and perhaps for trespass if signs are posted.

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*Safety of Aeronauts.*—Every precaution should be taken to protect the airman from actual attempts against his safety, both on land and in the air, for the mere turn of a screw on the ground might lead to disaster later in the air. An interesting case of such *sabotage* occurred in France last June. A commissioned officer named Uberthier was raised from the ranks and promoted sub-lieutenant, owing to his bravery at the time of the mutiny of the 17th regiment at Beziers some years ago, when he prevented, at the risk of his life, the soldiers from blowing up the powder magazine. Some of the men who had a grudge against him are said to belong to the Labor Confédération and are alleged to have sworn to take revenge. During May and June, 1913, the sub-lieutenant had a series of strange accidents. One of these happened when he was flying at a height of 3,700 feet. Another time he was flying at a height of 2,400 feet when something gave way. On each occasion the aeroplane came down tilting sideways, and it was by a miracle that he was not killed. On a third occasion he was flying at a height of 300 feet when a valve got out of order, and it was by extraordinary presence of mind that the aviator held to his seat and managed to steer for a hedge, which saved his life. The apparatus was a complete wreck, and the police assisted the military authorities in making an inquiry, which reached no definite result. Obviously such attempts should be punished severely enough to discourage them.

*Homicide.*—Only a single case of homicide in the air is known to have occurred, and it left no one to prosecute. In July, 1911, Rumanian policemen near Doschoi saw a balloon guide rope trailing and drew down the craft. In the basket were the bodies of a girl and a young man, both showing evidence of a desperate struggle. The girl had been stabbed to death, the man shot. The girl proved to be the daughter of an army officer residing at Bukarest who was to have been married on the day the balloon was found. The man was her rejected lover, who had induced her to go on the balloon with him and then slain her and committed suicide.

### PENALTY CLAUSES.

Subject to the penalty clause of the act, the American Bar Association project, prepared by Judge Simeon E. Baldwin in 1910, provides in its section 2 that "no airship shall be flown from any point within the jurisdiction of the United States to a foreign country, or from any point within any state of the United States to any other state of the United States, or from any point in any territory of the United States to any other territory of the United States, or any state of the

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United States, or any foreign country, except under the conditions prescribed in the following section." The rules referred to are administrative in character. Practically complementary of this very general rule may be the first section of the British Aerial Navigation Act, 1911, which was designed specifically to protect the public. It says:

1. If any person navigates an air craft recklessly or negligently, or in a manner which is dangerous to the public, he shall be guilty of an offense under this act; and in determining whether an air craft is navigated in a manner which is dangerous to the public, regard shall be had to the amount of damage to persons and property likely to be occasioned in the event of a mishap occurring to the air craft.

The reverse of this proposition is equally important and was studied by the *Congresso Giuridico internazionale*, which passed the following order of the day on the obligation of succor:

In each legislation special regulations should be established to punish:

- a. Every person who creates an injurious peril (*danger de dommage*) to aeronauts and aéronaefs.
- b. Every person who causes injury to aeronauts and to aéronaefs, during their operation.

The congress has not judged that it should, in view of the actual state of the law, establish the principle of submitting to penal judgment any one who, without good reasons, fails to aid an aeronaut in distress.

Sperl comments in the same connection that "the Austrian penal law in force renders this possible through the rule of Section 85c, Strafgesetz, according to which "malicious damage is a heavily punished offense against public order, if directed against steam roads, ships, mines, or under any other especially dangerous circumstances."<sup>1</sup>

The penalty for a tortious or criminal aerial deed must necessarily be relied upon to give the law sanction. An aerial police force will eventually come into existence and its rudiments are already begun in France. As a tortious deed, trespass will immediately occur as inevitable, and on this phase of aerial law Judge James W. Gerard of New York has stated that there seemed to be no question but what a man actually did own the air above his property and could do as he pleased with it, so far as trespass went. He might say, "No airships allowed above this property," and he could enforce it. He could bring suit against any man who flew over his land. "But," continued Judge Gerard, "such an owner could not recover more than six cents damages unless the aviator caused some damage to the property. It would be simply a case of 'injury without damage.'" Judge Gerard's opinion is

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<sup>1</sup>Page 9.

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that an aeronaut cannot be restricted from flying anywhere he pleases, and that the air is "a way of necessity."

At present four laws may be cited for penalty clauses, the subject matter of the offense being chiefly violation of regulatory provisions only. These are the Connecticut and Massachusetts laws, the British Act, which is followed in the Indian Act, and the French decree of November, 1911. The first states:

Section 11. Any person flying an airship in this state who fails to comply with any of the foregoing provisions of this act shall be fined not more than one hundred dollars or imprisoned not more than six months, or both.

The second, the Bay State law of 1913, provides:

Section 12. Violation of any provision of this act shall be punished by a fine of not less than ten dollars nor more than five hundred dollars, or by imprisonment for not less than one month nor more than six months, or by both such fine and imprisonment.

The third, as first proposed, provided:

3. If any person is guilty of an offense under this act, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine, or on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both such imprisonment and fine.

By an amendment in Parliament the penalty as here stated was reduced to "imprisonment for six months, or to a fine of £200, or to both such imprisonment and fine." This law has been strengthened by a regulation of the Royal Aero Club.

So-called "joy" riding by mechanicians and others on machines not their own is a tortious act of which complaint has been made, although no regulation of actual legal character is yet in force. On April 13, 1911, the Board of Governors of the Aero Club of America voted to recommend to the New York Legislature that proper laws be passed making it a misdemeanor for any person to fly an aeroplane which is not his own property. This law would be similar to the new automobile law. Presumably such a law, if put into force, would impose penalties analogous to those of ordinary misdemeanors.

Of proposed laws something must be said, for most of them have been worked out independently of each other and therefore have been the result of separate trains of thought. The American Bar Association project for national legislation, definite as a set of regulatory provisions, provides nothing that would prove difficult of execution. Its penalty section reads:

Section 14. Any violation of any provision of this act by the owner or charterer of any airship, or by any aeronaut, shall be a misdemeanor,

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and punishable by a fine not exceeding \$1,000 or by imprisonment for not exceeding thirty days, or by both, at the discretion of the court.

It is certainly remarkable to see a fine of \$1,000 or imprisonment for a month in juxtaposition as punitive equivalents.

The California and Massachusetts projects of 1911 were prepared independently, but that of Massachusetts was suggested, in fact impelled by the action of the sister state of Connecticut. They are very like each other and agree on a like fine. The Massachusetts provision reads:

Section 5. Whoever violates any provision of this act shall for each offense be punished by a fine not exceeding one hundred dollars, or by imprisonment for a term not exceeding six months, or by both such fine and imprisonment.

The California project differs by omitting any mention of imprisonment, which is commendable seeing that the violation in any case could not be more than breach of licensing and registration provisions. This California clause says:

Section 4, Sub. 1. The violation of any of the provisions of this act by any owner or driver or operator of any motor vehicle as hereinbefore described, shall be deemed a misdemeanor, punishable upon conviction thereof by a fine not exceeding \$100 (one hundred dollars).

In March, 1910, the Aero Club de France issued a set of proposed regulations designed to serve as a model for national legislation. In November, 1911, a decree was issued in which many of the regulations were incorporated. Perhaps from the American point of view the distinctive feature of the two is the demand that every machine carry and fill out a log book. Though the official decree makes provision for the constant carriage of the log book and for its presentation on demand of the police, it does not mention any duty on their part of entering orders of themselves or the courts in it. The Aero Club project, however, has these interesting articles:<sup>1</sup>

Article 40. All offenses against the prescriptions of the present regulations will be prosecuted according to law.

Article 41. Every sentence is entered, not only on the minute book of the recorder of the tribunal police, but also in a special memorandum book sent to the owner of the air craft by the engineer of the principal town of the mineralogical district, along with the acknowledgement of the declaration of intended flight.

The penalties for any breach of the pending French regulations range from a fine of \$2.50 to \$200, and imprisonment for a term of from one day to a month. Grave offenses will entail suspension of the offender's navigation license for a period not exceeding six years.

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<sup>1</sup>Translation in *Air Craft*, March, 1912.